National Environmental Policy Act
Is Everything a Major Federal Action, Significantly Effecting the Environment?

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My name is Karen Budd Falen. I am both a rancher and an attorney who represents ranchers, farmers, private citizens and local governments who are either dependant upon the use of the federal lands or are impacted by some aspect of federal agency decision making. In fact, anyone who is impacted by any decision made by any federal agency is impacted by the National Environmental Policy Act ("NEPA"). In only one week, the *Federal Register* contained notices and requested comments on 30 documents analyzing or discussing actions that were determined to be "major federal actions, significantly effecting the quality of the human environment." The purpose of my testimony is to discuss with you the evolution of the federal courts' interpretation of what types of decisions constitute a "major" and "significant" "federal" action and to propose that the original intent of NEPA was not so expansive.

As you know, NEPA was adopted in 1969. Among the purposes of NEPA, 42 U.S.C. §§ 4321–4370f, are to "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." See 42 U.S.C. § 4321. Accordingly, NEPA requires, to the fullest extent possible, that all agencies of the Federal Government:

> [I]nclude in every recommendation or report on proposals for legislation and other ***major Federal actions*** significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
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> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

See 42 U.S.C. § 4332(2)(C) (emphasis added). NEPA requires all federal agencies to consider the environmental consequences of "major federal actions significantly affecting the quality of the human environment" by preparing an environmental assessment, and, in some cases, an environmental impact statement. See id.

NEPA is one of our most important tools for ensuring that all federal agencies take a "hard look" at the environmental implications of their actions or non-actions. See Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). However, unless a project involves a "***major federal action***," NEPA does not apply. See Macht v. Skinner, 916 F.2d 13, 16 n.4 (D.C. Cir. 1990).

NEPA is procedural in nature and does not require "that agencies achieve particular substantive environmental results," but it is "action-forcing" in that it compels agencies to collect and disseminate information about the environmental consequences of proposed actions that fall under their respective jurisdictions. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). NEPA's focus is to ensure that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts. See Goos v. Interstate Commerce Commission, 911 F.2d 1283, 1293 (8th Cir. 1990).

NEPA requires ***federal agencies*** – not states or private parties – to consider the environmental impacts of their proposed actions. See Macht v. Skinner, 916 F.2d at 18. "[F]or any major Federal action funded under a program of grants to States," however, NEPA allows a state agency to prepare an Environmental Impact Statement for a federal agency if certain

conditions are met. See 42 U.S.C. § 4332(2)(D). NEPA thus focuses on activities of the federal government and does not require federal review of the environmental consequences of private decisions or actions, or those of state or local governments. See Goos v. Interstate Commerce Commission, 911 F.2d at 1293. Regardless of whether the environmental impact statement ("EIS") is prepared by a federal or state agency, the twofold purpose of NEPA is "to inject environmental considerations into the ***federal*** agency's decisionmaking process," and "to inform the public that the [***federal***] agency has considered environmental concerns in its decisionmaking process." See Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 143 (1981) (emphasis added).

Federal agencies may also be bound by NEPA to perform additional environmental review of non-federal projects, notwithstanding the fact that the project is not federally funded. According to the regulations promulgated by the Council on Environmental Quality "("CEQ"), situate in the Executive Office of the President, major federal actions "include actions with effects that may be major and which are potentially subject to Federal control and responsibility." See 40 C.F.R. § 1508.18. These actions may be "entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." See 40 C.F.R. § 1508.18(a).

The regulation, 40 C.F.R. § 1508.18, further provides that "major federal actions" tend to include the "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." See 40 C.F.R. § 1508.18(b)(4). These regulations are due substantial deference from reviewing courts. See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

The regulations clearly indicate that "major federal actions" need not be federally funded

to invoke NEPA requirements. See 40 C.F.R. § 1508.18(a); see also Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d 270, 279 (6th Cir. 2001); Save Barton Creek Association v. Federal Highway Administration, 950 F.2d 1129, 1134 (5th Cir. 1992); Macht v. Skinner, 916 F.2d at 18; Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985, 990 (6th Cir. 1989); and Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039, 1042 (4th Cir. 1986). Of course, federal funding is a significant indication that a project constitutes a major federal action; however, the absence of funding is not conclusive proof of the contrary. See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 279; and Historic Preservation Guild of Bay View v. Burnley, 896 F.2d at 990.

In addition, it is apparent that a non-federally funded project may become a major federal action by virtue of the aggregate of federal involvement from numerous federal agencies, even if one agency's role in the project may not be sufficient to create major federal action in and of itself. See 40 C.F.R. §§ 1508.25(a)(3) (noting that agencies "may wish to analyze these actions in the same impact statement."); and 1508.27(b) (noting that "more than one agency may make decisions about partial aspects of a major [Federal] action."); see also Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042 (holding that "[b]ecause of the inevitability of the need for at least one federal [agency] approval, . . . the construction of the [state] highway will constitute a major federal action."). Thus, a federal agency's argument that it was only involved in one aspect of the non-federal project's design and approval process, does not necessarily serve to defeat a claim that the pervasiveness of federal activity required to complete the project converts the project into a "major federal action." See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 279.

As set forth above, NEPA requires federal agencies – not states or private parties – to

consider the environmental impacts of their proposed actions. See Macht v. Skinner, 916 F.2d at 18. However, federal involvement in a non-federal project may be sufficient to "federalize" the project for purposes of NEPA. Nevertheless, a state can not be required to comply with NEPA if one of its projects is found to involve "major federal action;" only federal agencies are held accountable. See id.

"[N]o litmus test exists to determine what constitutes 'major Federal action.'" See Save Barton Creek Association, 950 F.2d at 1134. Federal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA. See Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1480 (10th Cir. 1990). In order to determine whether a non-federal project is or is not a "major federal action," within the meaning of 42 U.S.C. § 4332(2)(C), courts shall consider the following factors. First, whether the project is federal or non-federal; Second, whether the project receives significant federal funding; and finally, when the project is undertaken by a non-federal party, whether the federal agency must undertake "affirmative conduct" before the non-federal party may act. See Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 54–55 (D.D.C. 2003), citing Macht v. Skinner, 916 F.2d 13 (D.C. Cir. 1990). No single factor of these three is dispositive, however, a non-federal project is generally considered a "major federal action" if it cannot begin or continue without prior approval of a federal agency. See Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042, citing Biderman v. Morton, 497 F.2d 1141, 1147 (2nd Cir. 1974); and Foundation on Economic Trends v. Heckler, 756 F.2d 143, 155 (D.C. Cir. 1985).

State and Private parties are not subject to NEPA. See Mineral Policy Center v. Norton, 292 F.Supp.2d at 54 n.29, citing Macht v. Skinner, 916 F.2d at 18. Accordingly, federal projects are, by definition, more likely to constitute "major federal action" than non-federal projects. See

id.

"Typically, a project is considered a major federal action when it is funded with federal money." See Mineral Policy Center v. Norton, 292 F.Supp.2d at 5 n.30, citing Southwest Williamson County Committee Association v. Slater, 243 F.3d at 278; see also Indian Lookout Alliance v. Volpe, 484 F.2d 11, 16 (8th Cir. 1973) (stating that "any project for which federal funds have been approved or committed constitutes a major federal action bringing into play the requirements of NEPA.").

However, where the federal financial assistance to the planning process in no way implies a commitment by any federal agency to fund any project(s) or to undertake, fund or approve any action that directly affects the human environment, the non-federal project receiving the financial assistance is not a "major federal action." See Macht v. Skinner, 916 F.2d at 16–17 (holding that the Federal funding of preliminary studies is not the firm commitment that could transform an entirely state-funded project into major federal action affecting the environment within the meaning of NEPA); see also Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F.2d 1333, 1347 (5th Cir. 1979) (holding that development of regional transportation plan is not major federal action). An adequate Environmental Impact Statement would, of course, be a necessary prerequisite for the expenditure of federal funds on the project itself. See id. at 17.

In most cases in which a federal agency makes a direct grant for a non-federal project, the use of federal funds for the project is sufficient to bring it under NEPA if the federal financial commitment is clear. See Daniel R. Mandelker, NEPA LAW AND LITIGATION § 8:20 (2nd ed. 2004). However, a court may find a project is not federalized if federal funding is minimal. See id., citing Ka Makani 'O Kohala Ohana Inc. v. Department of Water Supply, 295 F.3d 955

(9th Cir. 2002) (federal funding 1.3% of project); and Friends of Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975) (federal funding 10% of project). Finally, a project is not federalized if a federal funding commitment has not been made. See id.

Federal participation sufficient to make a non-federal action "federal" arises most clearly when a federal agency takes an action that authorizes a non-federal entity to undertake an activity or a project. In order for NEPA to apply to non-federal projects, the federal agency must engage in some "affirmative conduct." See Mineral Policy Center v. Norton, 292 F.Supp.2d at 5 n.31, citing State of Alaska v. Andrus, 429 F.Supp. 958, 962–63 (D. Alaska 1977). Federal permits, leases, and other approvals in federal agency programs are the typical examples. "If . . . the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no effect on the agency's actions, and therefore, NEPA is inapplicable." See Mineral Policy Center v. Norton, 292 F.Supp.2d at 5 n.31, citing Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1151 (D.C. Cir. 2001); see also Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042 (stating that a "non-federal project is considered a 'federal action' if it cannot begin or continue without prior approval of a federal agency."); South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir. 1980) (holding that "ministerial acts . . . have generally been held outside the ambit of NEPA's EIS requirement."); Minnesota v. Block, 660 F.2d 1240, 1259 (8th Cir. 1981) (stating that because "the Secretary has no discretion to act, no purpose can be served by requiring him to prepare an EIS, which is designed to insure that decisionmakers fully consider the environmental impact of a contemplated action."); and Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir. 1988) (stating that the "EIS process is supposed to inform the decisionmaker. This presupposes he has judgment to exercise. Cases finding 'federal' action emphasize authority to exercise

discretion over the outcome.").

There are two alternative bases for finding that a non-federal project constitutes a "major federal action" such that NEPA requirements apply. First, when the federal decisionmakers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project. Second, when the non-federal project restricts or limits the statutorily prescribed federal decisionmakers' choice of reasonable alternatives. If either test is satisfied, the non-federal project must be considered a "major federal action." Both tests require a situation-specific and fact-intensive analysis. See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 281.

If the federal participation in the project is substantial, then the state should not be allowed to move forward until all of the federal approvals have been granted in accordance with NEPA. See Macht v. Skinner, 916 F.2d at 18–19. For example, Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039 (4th Cir. 1986), involved an attempt to enjoin construction of a county highway designed to pass through a state park. The court found that the county highway project involved "major federal action," because (1) the highway crossed a state park that had been purchased with a substantial federal grant; therefore, the county needed the approval of the Secretary of the Interior to convert the park land to other than recreational use; (2) the county needed a § 404 permit from the Army Corps to dredge wetlands; and (3) the county might need the approval of the Secretary of Transportation to use park land for a transportation project. See Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042. On these facts, the Fourth Circuit Court of Appeals held that the district court should have considered the motion to enjoin the county's construction until the federal officials complied with NEPA. See id. at 1043.

Importantly, the court in Gilchrist did not hold that the state had to comply with NEPA, because the approval of several federal agencies was a necessary precondition to the state project. Instead, Gilchrist held that because the state need permits and discretionary approval from several federal agencies in order to build a substantial part of the highway, the state could not construct any portion of the highway until the federal agencies had approved the project in compliance with NEPA.

Furthermore, in general, "a non-federal project is considered a 'federal action' if it cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome." See Sugarloaf Citizens Association v. Federal Energy Regulatory Commission, 959 F.2d 508, 513–14 (4th Cir. 1992). The mere approval by the Federal government of an action by a state/private party, where that approval is not required for the non-federal project to move forward, will not constitute a "major federal action" under NEPA. See Mayaguezanos Por La Salud Y El Ambiente v. United States, 198 F.3d 297, 301–02 (1st Cir. 1999) (held that voluntary notification of the Coast Guard by shippers of nuclear waste pertaining to transit through territorial waters did not constitute major federal action; the United States has chosen not to regulate shipments of nuclear waste through its territorial waters – there are no requirements that it do so, nor is it immediately evident that it would have that authority if it so chose); see also Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission, 59 F.3d 284, 292–93 (1st Cir. 1995) (found major federal action where a federal agency approved the release of funds from a trust held by the agency that were necessary for a project to go forward; the effect of this action was explicitly to permit the private actor to decommission a nuclear facility).

When the federal government has actual power to control a non-federal project (*i.e.*, the

federal agency's action must be a legal condition precedent that authorizes the other party to proceed with the action), the project constitutes a "major federal action." See Ross v. Federal Highway Admin., 162 F.3d 1046, 1051 (10th Cir. 1998); Ringsred v. City of Duluth, 828 F.2d 1305, 1308 (8th Cir. 1987); and NAACP v. Medical Center, Inc., 584 F.2d 619, 628 n.15 (3rd Cir. 1978). If federal approval is the prerequisite to the action taken by the state/private parties, or if the federal agency possesses some form of authority over the outcome, then the non-federal project constitutes "major federal action." See Mayaguezanos Por La Salud Y El Ambiente v. United States, 198 F.3d at 301–02 (held no major federal action under NEPA, because United States was not assigned a role, nor had any control, over the shipment of nuclear waste through its territorial waters); see also United States v. South Florida Water Mgmt. Dist., 28 F.3d 1563, 1572 (11th Cir. 1994) (holding that the touchstone of a major federal activity constitutes a federal agency's authority to influence non-federal activity); and Save Barton Creek Association v. Federal Highway Administration, 950 F.2d at 1134 (stating that the "distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects.").

Moreover, the need for a federal license or approval could sometimes trigger NEPA, but not where the approval did not involve close scrutiny of the action or anything more than notice for safety purposes. See Citizens for Responsible Area Growth v. Adams, 680 F.2d 835, 839–40 (1st Cir. 1982) (held that construction of an airport hangar by private parties with private monies was not federal action for NEPA purposes, and that the mere appearance of the proposed construction on a federally approved Airport Layout Plan did not create sufficient federal involvement to require an Environmental Impact Statement).

Finally, if no federal agency has jurisdiction over the non-federal project, the federal agency lacks sufficient control or responsibility over the non-federal project to influence the

project's outcome. See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 284. Stated another way, whether an agency action or project is part of some other concededly "major federal action" depends largely on whether the agency exercises legal control over the allegedly non-federal action or project. See Goos v. Interstate Commerce Commission, 911 F.2d at 1294. In determining whether a federal agency exercises legal control, a court must consider whether some federal action "is a legal condition precedent to accomplishment of an entire non-federal project." See id., citing Winnebago Tribe v. Ray, 621 F.2d 269, 272 (8th Cir. 1980). A "major federal action" occurs when a federal agency has discretion in its enabling decision to consider environmental consequences and that decision forms the legal predicate for another party's impact on the environment. See id. at 1295, citing NAACP v. Medical Center, Inc., 584 F.2d at 633. In such a situation, it is fair to say that the agency has significantly contributed to the environmental impact. See id.

A state may not begin construction of any part of a project if the effect of such construction would be to limit significantly the options, or choice of reasonable alternatives, of the federal officials who have discretion over substantial portions of the project. See Macht v. Skinner, 916 F.2d at 19 (held that compliance with NEPA was not required where the only federal involvement was the issuance of a wetlands permit covering a maximum of 3.58 acres of the 22.5-mile project); see also Sierra Club v. Alexander, 484 F.Supp. 455, 572 (N.D. N.Y. 1980) (held that the court was empowered to enjoin private construction of shopping mall until Army Corps complies with NEPA where completion of the project will require Army Corps approval to re-channel 2,000 linear feet of creek and fill 38 acres of wetlands).

If the federal decisionmakers' choices were limited by state/private actions, then the non-federal project would constitute a "major federal action," despite the agencies' lack of

jurisdiction. See Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d at 284 n.13. Where there is no pressure on federal decisionmakers, however, then the absence of jurisdiction becomes the determinative factor. See id.

Moreover, non-federal actors may not be permitted to evade NEPA by completing a project without an Environmental Impact Statement and then presenting the responsible federal agency with a *fait accompli* (*i.e.*, fact or deed accomplished, presumably irreversible). See Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d at 1042.

It is well settled that non-federal parties may be enjoined, pending completion of an Environmental Impact Statement, where those non-federal entities have entered into a partnership or joint venture with the Federal Government to obtain goods, services, or financing. See Biderman v. Morton, 497 F.2d 1141, 1147 (2nd Cir. 1974). A joint venture between a state/private party and the Federal government to obtain goods or services from a Federal agency clearly constitutes a major federal action subject to NEPA. See Sierra Club v. Hodel, 544 F.2d 1036, 1044 (9th Cir. 1976) (holding that construction of hydroelectric power plant may be enjoined until federal agency prepared Environmental Impact Statement, because the Bonneville Power Administration federalized the project by contracting to construct a transmission line and supply power to the plant).

No litmus test exists to determine what constitutes "major Federal action" under the National Environmental Policy Act. Federal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA. However, the following guidelines may assist non-federal actors in determining whether a non-federal project is subject to the requirements of NEPA:

1. **The provisions of NEPA will apply under the following circumstances —**

   a. The non-federal project is entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies;

   b. The project receives significant federal funding;

   c. The federal agency must undertake "affirmative conduct" before the non-federal party may act;

   d. The project cannot begin or continue without prior approval of a federal agency;

   e. The federal decisionmakers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project;

   f. The non-federal project restricts or limits the statutorily prescribed federal decisionmakers' choice of reasonable alternatives;

   g. The federal agency possesses authority to exercise discretion over the outcome of the project;

   h. The federal agency's action is a legal condition precedent that authorizes the other party to proceed with the project; or

   i. The non-federal entities have entered into a partnership or joint venture with the Federal Government to obtain goods, services, or financing.

2. **The provisions of NEPA will <u>not</u> apply under the following circumstances —**

   a. The federal financial assistance to the planning process in no way implies a commitment by any federal agency to fund any project(s) or to

undertake, fund or approve any action that directly affects the human environment;

b. The federal funding is minimal;

c. The federal agency does not have sufficient discretion to affect the outcome of non-federal project;

d. The role of the federal agency is merely ministerial;

e. The approval by the Federal government of non-federal project, where that approval is not required for the non-federal project to move forward;

f. The approval did not involve close scrutiny of the non-federal project;

g. The federal agency lacks jurisdiction over the non-federal project;

These guidelines are not intended to be exhaustive, nor apply to any particular situation, but should provide sufficient guidance to determine whether a non-federal project may or may not be subject to the provisions of NEPA. Each non-federal project requires a situation-specific and fact-intensive analysis of the aforementioned factors.

One such case stated that a "major federal action" was one that requires substantial planning, time, resources, or expenditure. National Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972). Another court held that "major actions" were ones projects with federal funding usually over $1,000,000, large increments of time for planning or construction, the displacement of many people or animals, or the reshaping of large areas of topography." Township of Ridley v. Blanchette, 421 F. Supp. 435 (E.D.Pa. 1976). That court went on to state:

In sum, "major" is a term of reasonable connotation, and serves to differentiate

> between projects which to not involve sufficiently serious effects to justify the costs of completing an impact statement and those projects with potential effects which appear to offset the costs in time and resources of preparing a statement.

Id. at 446.

In more prominent view however, the term "major" has received less attention and in some cases, has been simply collapsed with the term significant. The leading case in adopting this collapsed definition is Minnesota Public Interest Research Group v. Butz (I), 498 F.2d 1314 (8th Cir. 1974). In that case, the court held that NEPA's policies would be better served with a collapsed view of "major" and "significant" so that a "minor" federal action significantly effecting the environment would still be subject to NEPA. Based upon that court case, the Council of Environmental Quality ("CEQ") revised its regulations defining "major" to state that "major reinforces but does not have a meaning independent of 'significantly.'" 40 C.F.R. § 1508.18.

Given that the term "major" has been essentially eliminated from the consideration in whether to prepare a NEPA document, the CEQ regulations and court cases focuses on the term "significant." According to the CEQ regulations, the term "significant" is to be measured in terms of both context and intensity. Context has been very broadly defined to include short-term and long-term effects to the society as a whole, the affected region, the affected interests and the locality. See Simmons v. Grant, 370 F. Supp. 5 (S.D.Tex 1974). Intensity relates to the severity of the impact, both beneficial and negative. Such intensity is usually determined by comparing the potential project to the baseline. In an example often used by the courts, one more polluting factory in an industrial area "may represent the straw that breaks the back of the environmental camel." Hanly v. Kleindienst (II), 471 F.2d 823, 830-31 (2nd Cir. 1972). Other circuit courts have held that an action can be significant even though the environmental impact is limited.

National Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972). The 9th Circuit Court has an even more expansive view holding that an impact statement must be prepared if an agency's action "may" have a significant impact on the environment. See e.g. National Parks and Conservation Association v. Babbitt, 241 F.3d 722 (9th Cir. 2001) and the other 85 cases with the same holding.

And just where have these determinations lead. Assuming that the 30 NEPA related notices in last week's *Federal Register* is typical, in the last year, the public was given the opportunity to review 46,800 NEPA notices. With regard to individual environmental impact statements ("EIS") and environmental assessments ("EA"), according to the *Federal Register* website, 50 EISs and 50 EAs have been published since January, 1, 2005. Importantly, not all EAs or EISs are published in the *Federal Register.* According to the CEQ, in 1997, 498 EISs alone were completed by the federal agencies. Litigation against 102 of those NEPA documents were filed. Over one-half of those suits were filed by "public interest organizations." A very cursory review of the websites for the Forest Guardians, Southwest Center for Biological Diversity, National Wildlife Federation and Earthjustice shows that this litigation alleging violation of NEPA have increased exponentially. According to this web search, in 2004 and 2005 alone at least 65 cases were filed which included at least some cause of action involving the National Environmental Policy Act.

Based upon this analysis, my suggestion is to revisit the reason that NEPA was adopted–to force consideration of "major" actions "significantly" impacting the environment. I strongly agree with those who advocate for public involvement in agency decision making processes. However, in today's rampant environmental litigation it is extremely difficult to imagine that ANY federal decision or action can escape NEPA review. This includes actions

that simply have no impact, such as putting in a water trough, or building a temporary fence. Although the CEQ has changed the regulations to subsume "major" into "substantially," Congress used both modifiers to inform the federal agencies when NEPA compliance is necessary. I would argue that Congress should again revisit the original intent of the NEPA litigation.